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5 **IN THE UNITED STATES DISTRICT COURT**

6 **FOR THE DISTRICT OF ARIZONA**

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8 Brandon M. Walsh,

9 Plaintiff,

10 v.

11 Federal National Mortgage Association,

12 Defendant.

No. CV-15-00761-PHX-JJT

13

14 **ORDER**

15 At issue is Defendant’s Motion for Summary Judgment (Doc. 139), to which  
16 Plaintiff filed a Response (Doc. 170) and Defendant filed a Reply (Doc. 174). For the  
17 reasons stated below, the Motion is granted.

18 **I. BACKGROUND**

19 Defendant is a government-sponsored entity created by Congress to purchase  
20 mortgage loans from lenders and thereby help stabilize the market for residential  
21 mortgages. (Compl. ¶¶ 8–9; Doc. 40, Answ. ¶¶ 8–10.) Defendant publishes a “Selling  
22 Guide” to inform lenders of the specific requirements for purchase by Defendant. (Compl.  
23 ¶ 12; Answ. ¶ 12.) Defendant also licenses an automated underwriting system known as  
24 Desktop Underwriter (“DU”). (Compl. ¶ 15; Answ. ¶ 15.) DU is designed to simplify the  
25 process of discerning whether a loan would be eligible for purchase by Defendant. (Compl.  
¶ 15.)

26 Lenders who use DU input a consumer’s “tri-merge” credit report, which consists  
27 of the consumer’s credit reports from three of the top credit repositories in the United  
28 States. (MSJ at 3.) From there, DU generates a Findings Report that details the consumer’s

1 credit and concludes whether or not a loan made to that consumer would be eligible for  
2 purchase by Defendant. (Compl. ¶ 20; MSJ at 3.) A Findings Report that lists a “Refer with  
3 Caution” rating indicates that Defendant would not purchase the subject mortgage loan.  
4 (Compl. ¶ 34.)

5 The rating produced in a DU Findings Report is based on the consumer’s credit  
6 history—most relevant here, the program considers whether a consumer has completed a  
7 short sale of a property or whether a consumer’s property has been foreclosed upon. A loan  
8 to a consumer who made a short sale of a mortgaged property may still be eligible for  
9 purchase by Defendant, as long as the short sale occurred more than two years before the  
10 consumer’s current loan application. (Compl. ¶ 40, Ex. 3.) But if the consumer previously  
11 had a property foreclosed upon, he must wait seven years before any loan made to him  
12 becomes eligible for purchase by Defendant. Any application before those seven years are  
13 up would come back with a “Refer with Caution” rating and “be ineligible for delivery to  
14 [Defendant] as a DU loan.” (Doc. 1-2, DU Clarification at 1.)

15 Plaintiff alleges that Defendant failed to distinguish between a foreclosure and a  
16 short sale in its DU algorithm. (Compl. ¶ 44.) Indeed, Defendant responded to widespread  
17 concern about this practice in 2013, when it released “Desktop Underwriter Clarification.”  
18 (DU Clarification.) Defendant explained that DU reviews “manner of payment” (“MOP”)  
19 codes associated with important transactions in a consumer’s credit history as a way to  
20 determine the rating in the DU Findings Report. (DU Clarification at 1.) A foreclosure is  
21 indicated by MOP code 8 (foreclosure). And at the time of Defendant’s clarification, “no  
22 codes provided in the credit report data received by DU [] specifically identify a  
23 preforeclosure sale.”<sup>1</sup> (DU Clarification.) Thus, Plaintiff alleges that any consumer who  
24 engaged in a short sale had an MOP code 8 appear on his DU Findings Report, indicating  
25 a foreclosure that did not actually occur, and thereby rendering any loan within seven years  
26 of the short sale ineligible for purchase by Defendant. (Compl. ¶ 44.)

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28 <sup>1</sup> Defendant uses the terms “preforeclosure sale” and “short sale” interchangeably.  
(DU Clarification at 1.)

1 Plaintiff negotiated a short sale of his real estate in or around 2012. (Compl. ¶¶ 26–  
2 28.) After waiting the requisite two years to apply for a new mortgage loan for a separate  
3 property, Plaintiff was denied conventional mortgage financing multiple times. (Compl. ¶¶  
4 30–33.) Plaintiff alleges that “the basis for each denial was a DU Findings Report that  
5 contained a ‘Refer with Caution’ recommendation.” (Compl. ¶ 34.) Further, Plaintiff  
6 alleges that “even though a DU Report correctly identified a previous short sale . . . the  
7 same DU Report also manufactured a non-existent foreclosure” in the manner described  
8 above. (Compl. ¶ 44.) Plaintiff contends that Defendant’s practice of listing an MOP code  
9 8 for a short sale caused his application to receive a “Refer with Caution” rating and led to  
10 subsequent denials by lenders. (Compl. ¶ 45.)

11 On April 27, 2015, Plaintiff filed “this action on behalf of himself and other  
12 similarly-situated persons . . . to redress Defendant’s past, present and continuing violations  
13 of the FCRA.” (Compl. ¶ 1.)<sup>2</sup> On February 6, 2018, Defendant filed a Motion for Summary  
14 Judgment (Doc. 139), to which Plaintiff filed a Response (Doc. 170) and Defendant filed  
15 a Reply (Doc. 174).

## 16 **II. LEGAL STANDARD**

### 17 **A. Motion for Summary Judgment**

18 Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is  
19 appropriate when: (1) the movant shows that there is no genuine dispute as to any material  
20 fact; and (2) after viewing the evidence most favorably to the non-moving party, the  
21 movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*,  
22 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th  
23 Cir. 1987). Under this standard, “[o]nly disputes over facts that might affect the outcome  
24 of the suit under governing [substantive] law will properly preclude the entry of summary  
25 judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A “genuine issue”

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28 <sup>2</sup> Plaintiff also filed a Motion for Class Certification (Doc. 133) on January 31, 2018.  
He seeks to certify a class of plaintiffs who were allegedly denied mortgage financing for  
the same reason. (Doc. 135 at 11.)

1 of material fact arises only “if the evidence is such that a reasonable jury could return a  
2 verdict for the nonmoving party.” *Id.*

3 In considering a motion for summary judgment, the court must regard as true the  
4 non-moving party’s evidence, if it is supported by affidavits or other evidentiary material.  
5 *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party  
6 may not merely rest on its pleadings; it must produce some significant probative evidence  
7 tending to contradict the moving party’s allegations, thereby creating a material question  
8 of fact. *Anderson*, 477 U.S. at 256–57 (holding that the plaintiff must present affirmative  
9 evidence in order to defeat a properly supported motion for summary judgment); *First Nat’l*  
10 *Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

11 “A summary judgment motion cannot be defeated by relying solely on conclusory  
12 allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.  
13 1989). “Summary judgment must be entered ‘against a party who fails to make a showing  
14 sufficient to establish the existence of an element essential to that party’s case, and on  
15 which that party will bear the burden of proof at trial.’” *United States v. Carter*, 906 F.2d  
16 1375, 1376 (9th Cir. 1990) (quoting *Celotex*, 477 U.S. at 322).

17 **B. Fair Credit Reporting Act**

18 At issue in this case is an alleged violation of the Fair Credit Reporting Act  
19 (“FCRA”). The FCRA governs consumer reporting agencies (“CRAs”). A consumer  
20 reporting agency is

21 any person which, for monetary fees, dues, or on a cooperate nonprofit basis,  
22 regularly engages in whole or in part in the practice of assembling or  
23 evaluating consumer credit information or other information on consumers  
24 for the purpose of furnishing consumer reports to third parties, and which  
uses any means or facility of interstate commerce for the purpose of  
preparing or furnishing consumer reports.

25 15 U.S.C. § 1681a(f).

26 Under § 1681e (“Reasonable Procedures provision”) of the FCRA, “[w]henever a  
27 consumer reporting agency prepares a consumer report it shall follow reasonable  
28 procedures to assure maximum possible accuracy of the information concerning the

1 individual about whom the report relates.” 15 U.S.C. § 1681e(b). A “consumer report” is  
2 any

3 communication of any information by a consumer reporting agency bearing  
4 on a consumer’s credit worthiness, credit standing, credit capacity, character,  
5 general reputation, personal characteristics, or mode of living which is used  
6 or expected to be used or collected in whole or in part for the purpose of  
7 serving as a factor in establishing the consumer’s eligibility for-- (A) credit  
or insurance to be used primarily for personal, family, or household purposes.

15 U.S.C. § 1681a(d)(1).

A CRA may violate the FCRA either negligently or willfully. Under § 1681n (“willful noncompliance section”), a violator is liable to the consumer for: (1) any actual damages between \$100 and \$1000; (2) punitive damages; and (3) “the costs of the action together with reasonable attorney’s fees as determined by the court.” U.S.C. § 1681n(a). Under § 1681o (“negligent noncompliance section”), a violator is liable only for actual damages sustained by the consumer and “the costs of the action together with reasonable attorney’s fees as determined by the court.” U.S.C. § 1681o(a). In other words, a willful violation carries the additional consequence of punitive damages, while a negligent violation does not.

The willful noncompliance section contemplates not only those violations where a CRA acts knowingly, but also where a CRA acts recklessly in violation of the FCRA. *See Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 57–61 (2007). A CRA acts in reckless disregard of a consumer’s rights when its action “is not only a violation under a reasonable reading of the statute’s terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.” *Id.* at 69. Thus, as the Court explained in its July 20, 2017 Order, “a party alleging a willful violation of the FCRA under 15 U.S.C. § 1681n must establish that the defendant’s conduct reflected (1) an objectively unreasonable reading of the statute that (2) ran the risk of violating the law substantially greater than the risk associated with a mere careless reading.” (July 20, 2017 Order at 5.) Courts consider the following factors to determine whether a reading is objectively reasonable: (1) whether the interpretation is grounded in

1 the text of the statute; (2) whether there is a lack of guidance from appellate courts or the  
2 Federal Trade Commission that might have indicated the reading was incorrect; and (3)  
3 whether the FCRA itself is unclear on the issue. *Safeco Ins. Co. of Am.*, 551 U.S. at 69. A  
4 CRA who violates the FCRA, but did so based on an interpretation of the Act that was not  
5 objectively unreasonable, cannot be liable for a willful violation.

6 **III. ANALYSIS**

7 Plaintiff claims that Defendant, acting as a CRA, violated the FCRA either willfully  
8 or negligently. Defendant moves for summary judgment on the basis that it is not a CRA,  
9 and if it is, that it was not an objectively unreasonable reading of the law for Defendant to  
10 believe it was not subject to the FCRA. (MSJ at 7.)

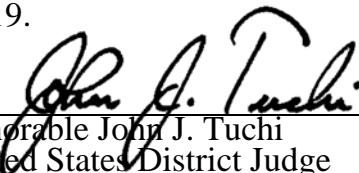
11 The Ninth Circuit's recent memorandum opinion in *Zabriskie v. Federal National*  
12 *Mortgage Association*, 17-16000 (9th Cir. Dec. 26, 2018) is dispositive here. In that similar  
13 action, to which Defendant was also a party, the Ninth Circuit held that Defendant is not a  
14 CRA and therefore is not subject to the FCRA. The holding resolves the issue before the  
15 Court and necessitates granting Summary Judgment. Plaintiff alleges no causes of action  
16 other than violations of the FCRA, and so this case also must be dismissed.

17 **IT IS THEREFORE ORDERED** granting Defendant's Motion for Summary  
18 Judgment (Doc. 139).

19 **IT IS FURTHER ORDERED** denying as moot Plaintiff's Motion to Certify Class  
20 (Doc. 133).

21 **IT IS FURTHER ORDERED** directing the Clerk of Court to enter judgment for  
22 Defendant and close this case.

23 Dated this 15th day of January, 2019.

24   
25 Honorable John J. Tuchi  
United States District Judge